

Pace Environmental Law Review

Volume 32

Issue 2 *Reconceptualizing the Future of Environmental
Law*
Spring 2015

Article 10

April 2015


Ending the Tyranny of the Status Quo: Building 21st Century Environmental Law

Scott Schang
Environmental Law Institute

Leslie Carothers
Environmental Law Institute

Jay Austin
Environmental Law Institute

Follow this and additional works at: <http://digitalcommons.pace.edu/pelr>

 Part of the [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Scott Schang, Leslie Carothers, and Jay Austin, *Ending the Tyranny of the Status Quo: Building 21st Century Environmental Law*, 32 Pace Env'tl. L. Rev. 524 (2015)
Available at: <http://digitalcommons.pace.edu/pelr/vol32/iss2/10>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

ARTICLE

Ending the Tyranny of the Status Quo: Building 21st Century Environmental Law

SCOTT SCHANG,* LESLIE CAROTHERS,** AND JAY AUSTIN***

Over the past few years, the Environmental Law Institute (ELI or the Institute) has worked to assess the notable successes and current challenges of United States environmental law to inform a new agenda for the twenty-first century. Founded in 1969, at the beginning of modern environmental law, the Institute has been both participant and analyst of an impressive record of major accomplishments in pollution reduction, greater protection of public health, and more intelligent conservation and management of natural resources, in both the public and the private sector. Like the majority of environmental lawyers and policy professionals examining today's challenges, we also see that the United States confronts even more complex environmental and natural resource impacts today. These include climate change, growth in human consumption and population, the consequences of these changes for water supplies, food security, and preservation of biodiversity, and the general sustainability of economic and social development supported by a diminished and inequitably distributed base of natural resources.

To undertake this assessment, we began by surveying the many reports and articles written on reform of environmental protection over the past twenty-five years and by conducting interviews of many of the early leaders in environmental law, environmental futurists, and current law students to obtain their

* Scott Schang is the Environmental Law Institute Acting President.

** Leslie Carothers is a Visiting Scholar at the Environmental Law Institute.

*** Jay Austin is a Senior Attorney at the Environmental Law Institute.

insight and ideas for improvement. We then outlined a potential program (1) to envision what America's environmental future should look like in 2050 and (2) to consider what ethical norms, objectives, implementation strategies, and public- and private-sector roles and responsibilities might form a sturdy platform to advance toward the objectives. This article offers a summary of our findings and a proposal for future dialogue.

I. TWENTY-FIVE YEARS OF MAJOR REPORTS ON ENVIRONMENTAL PROTECTION REFORM

Efforts to re-think U.S. environmental law go almost as far back as the laws themselves. If the "first wave" of command-and-control statutes¹ dates roughly from the 1970 Clean Air Act to the 1980 passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), by the late eighties there already were calls for new ideas and systemic reform.

For example, the high-profile, bipartisan "Project 88," co-chaired by Senators Tim Wirth and John Heinz, generally is credited with advancing market-based approaches for environmental protection, including the sulfur dioxide cap-and-trade program enacted in the 1990 Clean Air Act Amendments.² Originally conceived during a presidential election, it later was celebrated as an important, if rare, case of policy agreement among industry, environmentalists, and government.³

Just ten years later came a similarly ambitious, consensus-based reform process, the "Enterprise for the Environment" (E4E) effort chaired by former Environmental Protection Agency (EPA) Administrator William Ruckelshaus.⁴ The blue-ribbon panel

1. *E.g.*, Carol M. Rose, *Environmental Law Grows Up (More or Less), and What Science Can Do to Help*, 9 LEWIS & CLARK L. REV. 273, 275, 286-88 (2005).

2. See TIMOTHY WIRTH ET AL., PROJECT 88: HARNESSING MARKET FORCES TO PROTECT THE ENVIRONMENT 28 (1988); Robert W. Hahn & Robert N. Stavins, *Incentive-based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L.Q. 1, 22, 32 (1991).

3. See KATHY MCCAULEY ET AL., UNIV. OF PITTSBURGH INST. OF POLITICS, CROSSING THE AISLE TO CLEANER AIR: HOW THE BIPARTISAN "PROJECT 88" TRANSFORMED ENVIRONMENTAL POLICY (2008).

4. See WILLIAM D. RUCKELSHAUS & KARL HAUSKER, CTR. FOR STRATEGIC AND INT'L STUDIES, THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION: TOWARD A MORE DESIRABLE FUTURE (1998).

represented all sectors, including current leadership in Congress and the White House, and produced twelve recommendations for reforming the environmental protection system.⁵ Yet these prescriptions failed to gain traction in the politicized atmosphere of the late 1990s. Industry-funded analysts questioned the design of E4E's stakeholder process, arguing that it led to diminished commitment over time and a final report that differed greatly from initial expectations.⁶ Others cited it as an example of the inherent limits of consensus decision-making: too-general, unprioritized recommendations that reflected the status quo rather than real innovation.⁷

The past fifteen years have seen no shortage of general proposals for overhauling U.S. environmental protection. Some, taking their cues from Project 88, have coincided with the election cycle and have directly targeted an incoming Congress and/or White House.⁸ Others have been outputs of the political process, as with a decade-long series of National Academy of Public Administration (NAPA) reports produced at the specific request of Congress.⁹ Many other proposals and ideas were triggered by

5. *Id.* at 4.

6. TERRY F. YOSIE & TIMOTHY D. HERBST, USING STAKEHOLDER PROCESSES IN ENVIRONMENTAL DECISIONMAKING: AN EVALUATION OF LESSONS LEARNED, KEY ISSUES, AND FUTURE CHALLENGES 16-17 (1998) (claiming that E4E suffered from differing expectations among diverse participants, had unclear criteria for participation in an unwieldy stakeholder group, and led to disagreements on the process and disagreement about what was negotiable).

7. Cary Coglianese, *The Limits of Consensus*, 41 ENV'T 28 (1999).

8. *E.g.*, ALYSON FLOURNOY ET AL., CTR. FOR PROGRESSIVE REFORM, CPR FOR THE ENVIRONMENT: BREATHING NEW LIFE INTO THE NATION'S MAJOR ENVIRONMENTAL STATUTES (2007); DAVID SCHOENBROD ET AL., N.Y. LAW SCH. & N.Y. UNIV. SCH. OF LAW, BREAKING THE LOGJAM: ENVIRONMENTAL REFORM FOR THE NEW CONGRESS AND ADMINISTRATION (2009).

9. *See, e.g.*, JONATHAN B. HOWES ET AL., NAT'L ACAD. OF PUB. ADMIN., TAKING ENVIRONMENTAL PROTECTION TO THE NEXT LEVEL: AN ASSESSMENT OF THE U.S. ENVIRONMENTAL SERVICES DELIVERY SYSTEM (2007), available at <http://www.napawash.org/wp-content/uploads/2007/07-07.pdf>, archived at <http://perma.cc/PF3W-S9MH>; JONATHAN B. HOWES ET AL., NAT'L ACAD. OF PUB. ADMIN., ENVIRONMENT.GOV: TRANSFORMING ENVIRONMENTAL PROTECTION FOR THE 21ST CENTURY (2000); JONATHAN B. HOWES ET AL., NAT'L ACAD. OF PUB. ADMIN., RESOLVING THE PARADOX OF ENVIRONMENTAL PROTECTION: AN AGENDA FOR CONGRESS, EPA, & THE STATES (1997); JONATHAN B. HOWES ET AL., NAT'L ACAD. OF PUB. ADMIN., SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR EPA (1995).

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 527

reflecting on milestones such as the twenty-fifth anniversary of modern environmental protection¹⁰ or evaluating the progress made in the wake of the 1992 Rio Earth Summit.¹¹

Like Project 88 and E4E before them, these initiatives have in common their broad scope, comparatively isolated success, and a short shelf life. In the late nineties, efforts like the President's Council on Sustainable Development (PCSD) did have some official cachet and dovetailed with independent NAPA and Aspen Institute calls for "flexibility" in the system,¹² leading to acclaimed EPA programs like Project XL, the Common Sense Initiative, the Agency's public involvement policy and creation of the EPA Office of Information, and the Smart Growth Initiative.¹³ These programs introduced incremental but lasting reforms.

But even close PCSD observers lament the missed opportunity for a wider vision like the United States agreed to at the 1992 Rio Earth Summit.¹⁴ They cite the Council's subsequent lack of support from high-level political leaders and the public, lack of outreach to the same, failure to recommend a federally

10. BILL CLINTON & AL GORE, REINVENTING ENVIRONMENTAL REGULATION 2 (1995), *available at* <http://nepis.epa.gov/Exe/ZyPDF.cgi/9100TH76.PDF?Dockey=9100TH76.PDF>, *archived at* <http://perma.cc/S5LQ-U7JH>; YALE CTR. FOR ENV'TL LAW & POLICY, THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY, at ix (Marian R. Chertow & Daniel C. Esty eds., 1997).

11. AGENDA FOR A SUSTAINABLE AMERICA 7-9 (John C. Dernbach ed., 2009) [hereinafter Dernbach]; PRESIDENT'S COUNCIL ON SUSTAINABLE DEV., TOWARDS A SUSTAINABLE AMERICA: ADVANCING PROSPERITY, OPPORTUNITY AND A HEALTHY ENVIRONMENT FOR THE 21ST CENTURY 13 (1999); PRESIDENT'S COUNCIL ON SUSTAINABLE DEV., SUSTAINABLE AMERICA: A NEW CONSENSUS FOR THE PROSPERITY, OPPORTUNITY AND A HEALTHY ENVIRONMENT FOR THE FUTURE (1996).

12. JOHN E. BLODGETT, CONG. RESEARCH SERV., RL30760, ENVIRONMENTAL PROTECTION: NEW APPROACHES 7 (2000).

13. *Project XL*, EPA, <http://www.epa.gov/projectxl/> (last updated on Oct. 9, 2014), *archived at* <http://perma.cc/J6NH-NRSV>; *The Common Sense Initiative*, EPA, <http://www.epa.gov/region07/p2/volprog/csi.htm> (last updated Mar. 27, 2015), *archived at* <http://perma.cc/M78D-L2JZ>; *About the Office of Environmental Information*, EPA, <http://www2.epa.gov/aboutepa/about-office-environmental-information-oei> (last updated Mar. 12, 2015), *archived at* <http://perma.cc/8N72-CY8Q>; *Smart Growth*, EPA, <http://www2.epa.gov/smart-growth> (last updated Mar. 26, 2015), *archived at* <http://perma.cc/PRS7-SN77>.

14. For a summary of this wider vision, see *UN Conference on Environment and Development* (1992), UNITED NATIONS, <http://www.un.org/geninfo/bp/enviro.html> (last updated May 23, 1997), *archived at* <http://perma.cc/B6EB-7PNJ>.

coordinated national strategy, absence of a permanent institutional mechanism for implementing recommendations, and lack of political accountability for success or failure.¹⁵ With the twentieth anniversary of Rio, they continue to argue, the United States still needs to carry out a much more substantial reform agenda, with dozens of separate policy prescriptions, to truly implement “sustainable development.”¹⁶

The cyclical nature of these environmental reform initiatives and the marked similarity of their content have led to meta-studies that summarize and categorize the various kinds of recommendations made. In 2000, the Congressional Research Service analyzed the previous decade’s worth of “new approaches” to environmental protection and found that their proposals fell into five categories: (1) information, (2) public-sector processes, (3) incentives, (4) market mechanisms, and (5) management principles.¹⁷ These categories can be further subdivided into groups of general concepts and specific policy proposals, as seen below:¹⁸

- ❖ **Information.** Approaches to improve the quantity and quality of information and to organize it effectively so as to enhance the knowledge base underlying decisions affecting the environment:
 - “Sound Science”;
 - Information focused on improving regulatory decisions, in particular risk analysis and cost-benefit analysis;
 - Information focused on improving planner/program manager decisions, in particular “green accounting” and materials accounting/materials management; and

15. John Dernbach, *Learning from the President's Council on Sustainable Development: The Need for a Real National Strategy*, 32 ENVTL. L. REP. 10648 (2002).

16. See, e.g., Dernbach, *supra* note 11, at 7.

17. See BLODGETT, *supra* note 12, at 2.

18. See *id.* at 2.

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 529

- “Information focused on improving consumer/voter decisions, in particular the Toxic Release Inventory and energy efficiency ratings.”¹⁹

❖ **Public Sector Processes.** Approaches to revise or create new governmental structures or processes for making environmental decisions:

- Environmental Federalism – state delegation – defederalism/devolution – “Civic Environmentalism”;
- Creation of an independent cost-benefit/risk assessment review body; and
- Establishment of a “Regulatory Budget.”²⁰

❖ **Incentives.** Approaches that emphasize incentives as opposed to regulatory or financial penalties for achieving environmental ends:

- Grants, loans, tax breaks;
- Procurement policies;
- Technical assistance; and
- Regulatory waivers, “Beyond compliance.”

❖ **Market Mechanisms.** “Approaches that rely on markets and common law for environmental decisions to the extent possible”²¹:

- Market mechanisms by which environmental standards can be met, including trading, banking, and offsetting of pollution rights; the “clean development mechanism,” to allow international trading;
- Market signals, such as through pollution taxes and liability risks under tort law (plus information such as from the Toxic Release Inventory); and
- Private markets/private property, including common-law remedies, trespass protections, and “free market environmentalism.”²²

19. *Id.* at 3.

20. *Id.* at 3.

21. *Id.* at 2.

22. *Id.* at 4.

❖ **Management Principles.** “Approaches to inculcate environmental values in public and private managerial decisions”²³:

- “Sustainability”;
- Precautionary principle;
- Ecosystem management;
- Environmental management systems;
- Pollution prevention;
- Certification; and
- “Good Management Practices”²⁴

More recently, George Washington University law professor Lee Paddock examined a number of environmental reinvention reports published between 1995 and 2007 and likewise found that “[t]he similarity of the conclusions from these studies and policy recommendations is striking.”²⁵ He distilled the conclusions into seven broad categories: (1) “[e]stablishing priorities, setting goals, and measuring progress”; (2) “[i]mproving access to information including good scientific data”; (3) “public engagement”; (4) “partnering and other forms of collaboration”; (5) “[b]ringing new financial resources to the table”; (6) “[i]nnovation in developing and deploying a broad range of approaches to solving environmental problems;” and (7) “[i]ndividual and corporate responsibility and extended producer responsibility.”²⁶

Paddock argues that although these reports produced a clear and relatively consistent reform agenda, “[e]qually striking . . . is the fact that the basic system of environmental management and the allocation of human and financial resources are little changed at their core after nearly [twenty] years of introspection.”²⁷ He offers a number of reasons why, generally speaking, alternative

23. BLODGETT, *supra* note 12, at 2.

24. *Id.* at 4.

25. LeRoy C. Paddock, *Green Governance: Building the Competencies Necessary for Effective Environmental Management*, 38 ENVTL. L. REP. 10609, 10615 (2008).

26. *Id.*

27. *Id.*

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 531

efforts “have occurred for the most part on the margins of environmental governance”²⁸:

- Collaborative decision-making and partnerships are increasingly used by EPA and a number of states, but collaboration and partnering are still not embedded as a core element of environmental management;
- Some advances have occurred in public involvement, especially with EPA’s public engagement policy, but many government administrators still are reluctant to fully engage the public;
- Innovation programs at both the federal and state level tend to be isolated from media-specific programs, and little attention has been paid to how to engage NGOs and the public in the innovation process;
- More information is available, but information is still not routinely seen as a central management strategy;
- Government-sponsored public education efforts remain a small part of most programs, limiting the impact that agencies could have on individual behavior and on the behavior of smaller businesses; and
- Except for voluntary programs, like Energy Star or Green Chemistry, and a limited number of state product laws, thinking about corporate responsibility and extended producer responsibility remains a minor element of the environmental governance equation.

Paddock himself concludes that some rethinking of environmental governance remains necessary, but he also points to political deadlock at both the federal and state levels²⁹—which has only intensified in the years since his article appeared. His prescriptions for regulatory reform, increased networking and partnerships, economic incentives, public information, education and participation, and innovation in environmental management

28. *Id.*

29. *Id.* at 10633.

all remain relevant, but they would depend on overcoming the same political indifference and institutional inertia that has sidelined most similar proposals for the past two decades or more.³⁰

More recent academic articles by Jonathan Adler³¹ and Jody Freeman and David Spence³² provide new perspective on the policy and political challenges continuing today. Adler's article laments the absence of a conservative vision for the environment, at least among most Republican politicians. He reviews conservative management principles, many of which, including eliminating subsidies, using property rights methods in common resource management, and more decentralized decision-making, have earned support well beyond the conservative think tanks that have promoted them.³³ He calls on conservatives to join the debate and not to cede the ground on environmental policy to those on their left.³⁴

Freeman and Spence present an appendix of figures showing the extreme extent of legislative gridlock in an article that examines in detail how EPA and the Federal Energy Regulatory Commission have worked with old statutes to address new problems that do not fit neatly into their authorizing statutes.³⁵ The social science underlying their figures confirms the impact of a distribution of policy preferences with one party on the left and one on the right: it limits the ability to move toward any middle group solution. Although the authors generally conclude that these two agencies, overseen by the courts, have been reasonably successful in addressing greenhouse gas pollution and modernization of energy policy,³⁶ their detailed review of how the agencies have gone about it amply demonstrates the difficulty of relying on laws adopted a generation ago to meet today's pressing

30. *Id.* at 10633-42.

31. Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENVTL. L. & POL'Y F. 253, 253-280 (2013).

32. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

33. Adler, *supra* note 31, at 254-55.

34. *See id.* at 258, 266-80.

35. Freeman & Spence, *supra* note 32, at 82.

36. *See id.* at 14, 80-81, app. at 82-92.

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 533

problems.³⁷ The political barriers inhibiting progress in advancing a new environmental agenda have not changed.³⁸

II. INTERVIEWING FOUNDERS, FUTURISTS, AND THE NEXT GENERATION TO IDENTIFY TRENDS

In addition to reviewing reports and suggestions for environmental reform from the past twenty-five years, we embarked on a multi-pronged approach to garner ideas from the founders of modern environmental law, people widely regarded as visionaries or experts on future trends in environmental law, and law students currently interested in environmental law and policy. We started these interviews and programs in 2010, with most occurring in 2011 and 2012. These interviews and discussions were intended to be a sample of outside opinion and to surface new ideas and hints of trends. They do not represent a scientific poll or represent the diversity of opinion in this area.

We arranged and videotaped oral histories with professionals widely regarded as “founders” of modern environmental law who were active in the late 1960s and early 1970s in shaping and implementing the foundational environmental statutes. ELI staff consulted with ELI’s board of directors for suggestions on the best candidates to interview. The final list of interviewees³⁹ reflects availability of the interviewees and our ability to reach them and schedule interviews.

Significant common themes emerged from these interviews relevant to reimagining environmental law. When asked what accounted for the blooming of federal environmental law in the 1970s, several interviewees pointed to two main factors: 1) an energized public that experienced environmental degradation, saw extreme examples of environmental catastrophes reported on the news, and demanded action; and 2) political opportunities for politicians of both parties to win or lose votes based upon their

37. *Id.*

38. *Id.* at 13-14.

39. Jim Moorman; William Ruckelshaus; Gus Speth; Henry Diamond; John Dingell; George Schultz; Bill Eichbaum; Bill Futrell; Bill Reilly; Bob Stanton; David Sive; Denis Hayes; Frances Beinecke; John Adams; Kinnan Golemon; Leslie Carothers; Russell Train; and Henry Waxman.

perceived environmental stance, particularly President Richard Nixon believing he could garner votes from likely opponent Edmund Muskie by signing environmental legislation.⁴⁰

When asked why reform or innovation in environmental law had largely stalled since the early 1990s, the interviewees pointed to the same factors: 1) a public that no longer experiences environmental degradation first-hand and has disengaged from environmental issues; and 2) a political system where only Democrats are associated with environmental improvements and Republicans cannot garner votes by taking pro-environmental stances.⁴¹ These same interviewees noted that it may take significant environmental degradation or catastrophes to once again energize public opinion to encourage political leaders to take environmental action.

40. See, e.g., Interview with Russell Train, Former Chairman, Council on Envtl. Quality & Adm'r, EPA, in Washington, D.C. (June 16, 2011). ("This was a very formative period because Nixon had strong political motivations. I seriously believe that everything that he did, he had a guy named Ed Muskie there in the Senate; a Senator from Maine who was the chief environmental spokesperson in the Senate and probably was going to be running for the presidency against Nixon. That may well have been a major reason why Nixon espoused the issue to try to finesse Muskie to take the issue away from him.").

41. Interview with William K. Reilly, Former Adm'r, EPA, in Washington, D.C. (Apr. 26, 2011) ("The biggest roadblocks to moving environmental progress in law and policy particularly, I think, are . . . a perception on the part of the country that we've essentially solved the most pressing environmental problems; that the air and water are very significantly cleaner than they were twenty-five or thirty years ago. The memories of people who do go back that far suggest that they should be reassured. This has been a great American success story and it has. I think as long as we have that aura of contentment or complacency it will be hard to move on some of the more demanding problems that have been unaddressed, such as pollution from farmland and from building sites, for example, those so-called non-point source problems, or moving on climate and the regulation of carbon."); Interview with William Ruckelshaus, Former Adm'r, EPA, in Seattle, Wash. (May 10, 2012) ("[The public is] not as nearly as supportive of protecting the environment and protecting public health as they once were. They are in the theoretical level. When it comes right down to practice, they're less supportive. Otherwise, these presidential candidates would be saying these things and the same thing with the Congress, the Republicans and the Congress are really taking on these regulatory agencies head on. That would not have happened in the decades leading up to the century because fundamentally, the public was concerned about its health, concerned about environmental protection, and they wouldn't politically permit these members of Congress or even candidates for president to get away with saying what they [now] are.").

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 535

Working in conjunction with David Rejeski, Director of the Science and Technology Innovation Program at the Wilson Center, we also interviewed 13 people identified by the ELI staff and board as thought leaders or “futurists,” professionals known for thinking broadly about future trends or for having innovative ideas about the environment and/or environmental governance.⁴² (Some of these were also interviewed as “founders.”) Although each interviewee was asked a standard set of questions, their perspectives were quite divergent and difficult to summarize succinctly. The following is a list of ideas, comments, and concepts raised by three or more of the interviewees, with the number of interviewees mentioning the item indicated in parentheses:

- Environmental law and policy needs to focus on systems, not pollution; focus should be on Earth systems; focus should be on systemic risks; focus should be on global, not national scale; we do not know how to manage the global commons; current approach will not change large systems; larger scale, linked systems getting worse. (7)
- Technology and society change too fast for traditional environmental law and policy to keep up with. (5)
- Regulations and prescribed goals have been most effective to date; moratoria work; regulations work when enforced. (5)
- Government’s tools are focused on industrial age, not computer age; environmental law and policy has been reactive, has not looked to technology as an environmental solution; sustainability requires an innovation strategy not a control strategy; need a new technological path; technology is key to reducing degree of impact per expanded unit of consumption. (5)
- Financial system is key; end subsidies; take out “inconsistencies”; transform economic markets;

42. Brad Allenby; Terry Davies; Hazel Henderson; Gunter Pauli; Gus Speth; John Todd; Bob Olson; Bill Eichbaum; Linda Fisher; Mary Wood; Tom Dietz; Doug Kysar; and Ted Parsons.

economy usually fixes the problems; price non-compliance. (5)

- Product-based approach leads to prevention; prevention is key; pollution prevention needs a more prominent role in EPA; cradle-to-cradle approach needed. (4)
- Need to rebrand environmentalism from doing less bad to doing something new; need a new story of what is happening and what could be; need unified paradigm of new thinking; people have lost emotional connection with environmental law. (4)
- Monitoring data are needed; need a State of the Environment Report. (3)
- Government is not leading innovation or foresight; it is not thinking about big problems. (3)
- Innovation should move to local government, not national; real environmental progress happens locally; need to scale local successes (air, water) to national, global levels. (3)

To help gather perspectives of the next generation of environmental professionals, ELI staff attended student-organized conferences at the law schools at the University of Michigan, the University of Oregon, and Yale.⁴³ At each program, we worked with students to organize a town-hall meeting type format for sharing ideas about areas most pertinent to students' interests and ideas they had for reforming environmental law. We also invited ELI's Summer 2010 interns and law clerks to present on this issue to ELI staff.

As with the futurists, the feedback represented a particularly wide-ranging variety of perspectives from over seventy individuals. Some common comments are summarized below,

43. 25 Years Back, 25 Years Forward: Environmental Law At The Crossroads, The 25th Annual Conference of the National Association of Environmental Law Societies, University of Michigan Law School (Mar. 23-24, 2012); 31st Annual Public Interest Environmental Law Conference: Earth, Too Big to Fail, University of Oregon School of Law (Feb. 28–Mar. 3, 2013); New Directions in Environmental Law: [Re]Claiming Accountability, Yale Law School & Yale School of Forestry & Environmental Studies (Feb. 25, 2012).

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 537

with a rough summary of the number of times they were mentioned in parentheses:

- Environmental issues need to be seen locally, as personally relevant; environmental impacts need to be experienced by individuals; increase reliance on local government. (7)
- Individuals need to understand and take responsibility for their impact to the environment. (5)
- Environmental challenges need to be communicated more succinctly and effectively. (5)
- Educating lawyers, other professionals, and the public about ecology, sustainability, and environmental degradation is paramount. (5)
- Research and messaging needs to end the false choice between environmental health and economic improvement. (4)
- Environmental law and policy needs to focus more on cross-cutting issues like climate change. (3)
- Environmental issues need to be connected to ethics and morality. (3)
- Environmental proponents should cross-pollinate more with other movements and interest groups, ranging from faith communities to unions to companies. (3)
- More work needs to be done to cross partisan lines; engage the right. (3)

As highlighted by these comments, education, communication, and wider collaboration are all priorities for future improvement.

III. E-2050 AGENDA

Both the reports and our interviews suggest that rebuilding constructive political engagement with environmental law will mean reviving public interest and advocacy for action on environmental problems. We believe that accomplishing this requires, among other things, that environmental advocates, including environmental professionals from all sectors, work to help redefine and advocate a national agenda of environmental

goals and strategies for achieving them.⁴⁴ Major business and international governmental organizations have undertaken a similar task in the Vision 2050 report of the World Business Council for Sustainable Development issued in 2010⁴⁵ and the current United Nations effort to formalize a set of Sustainable Development Goals, including many environmental and public health objectives.⁴⁶ These examples should encourage environmental professionals to join in both the formulation and, importantly, the publication and communication of environmental goals.

We recommend a U.S.-centric approach initially in this “E-2050” effort not out of disdain or doubt about the validity and usefulness of international approaches, but out of the conviction that U.S. policy formulation needs to go through its own process, both substantively in order to achieve lasting results and for political acceptability. To this end, we believe environmental professionals should convene an ongoing dialogue to identify the environmental vision, ethics, and goals toward which environmental protection to 2050 should strive. The discussion below presents an overview of topics that should be considered in building such an agenda.

A. Environmental Vision, Ethics, Endpoints, and Goals

Most efforts to develop a new agenda begin with a vision of future success and a set of goals to define the path forward. We believe the Institute’s own vision statement can serve as a starting point. It envisions a “healthy environment, prosperous economies, and vibrant communities founded on the rule of law,” a statement similar to the vision set forth in the National

44. For an article arguing for the active engagement of environmental lawyers in educating the community on old and new ethics and goals of environmental protection today, see Sanford E. Gaines, *Reimagining Environmental Law for the 21st Century*, 44 ENVTL. L. REP. 10188 (2014).

45. See *Vision 2050: The New Agenda for Business*, WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., <http://www.wbcsd.org/pages/edocument/edocumentdetails.aspx?id=219> (last visited Apr. 1, 2015), *archived at* <http://perma.cc/NX37-5VX4>.

46. See *Sustainable Development Goals*, UNITED NATIONS, <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals> (last visited Apr. 1, 2015), *archived at* <http://perma.cc/QV3H-FBAW>.

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 539

Environmental Policy Act.⁴⁷ In keeping with the focus on ethics suggested by students, as discussed above, such a statement might recognize and reference the importance of foundational ethical principles that not only support sound environmental law, but also guide social and individual activities that advance environmental values and are not governed by law.

Examples of such principles embodying social values might include 1) respect for individual rights, 2) respect for property rights and free markets as fundamental to prosperity, subject to the duty to prevent significant harm to other beings and common resources, 3) objectivity in the measurement and assessment of long- and short-term impacts on human health and the environment, and 4) other ethical principles, like transparency, that are essential to democratic decision-making. Defining a desired state of the environment and natural resources for 2050 is not a simple task. The international goal of sustainability sets an ambitious objective of optimizing economic, environmental, and social conditions and preserving a strong resource base for future generations. Many U.S. environmental statutes define objectives in aspirational terms, such as restoring and preserving fishable, swimmable waters of the United States or achieving standards of air quality that protect human health and the environment with a margin of safety.⁴⁸ But these broad objectives do not provide enough detail to enable government, business, and civil society to set clear priorities and to monitor and report on progress to other stakeholders, especially the general public. The lack of clear and communicable goals is a serious weakness in environmental governance.⁴⁹

47. *About the Environmental Law Institute*, ENVTL. LAW INST., <http://www.eli.org/about-environmental-law-institute> (last visited Apr. 21, 2015), *archived at* <http://perma.cc/S9XD-DQ8T>. Or, as the National Environmental Policy Act puts it, “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a) (2012).

48. See Clean Water Act, 33 U.S.C. § 1251; Clean Air Act, 42 U.S.C. § 7401.

49. There is relatively little analysis in the legal literature on the significance of setting environmental goals. *But see* Michael P. Vandenberg, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law*, 85 KY. L.J. 803 (1997); *see also* ALYSON C. FLOURNOY & DAVID M. DRIESEN, *BEYOND ENVIRONMENTAL LAW: POLICY PROPOSALS FOR A*

It should be possible to develop a set of relatively simple descriptions of endpoints for which goals and measures could be developed.⁵⁰ An example of such an endpoint together with implementation goals and measures is as follows:

Environmental Endpoint	Environmental Goals and Measures
Production and materials recovery processes yield no net waste of energy and materials, emit no harmful substances, and contain no harmful ingredients.	<p>The average good consumed by Americans uses eighty percent less energy and resources than was required in 1990.</p> <p>All products with existing or projected sales of \$10 million or more carry a standardized lifecycle analysis that highlights the resources used and emitted to create, use, and dispose of the product and meaningful information about exposures during use.</p>

Such broad narrative standards could help to focus policy-makers in the public and private sectors on the operational goals and measures necessary to move the community toward the desired endpoints. Tracking of specific goals could lay the foundation for a much more robust program of public communication and education on where our environmental agenda is taking us and whether we are making headway in achieving the desired endpoints. We lack that foundation today.

BETTER ENVIRONMENTAL FUTURE (2010) (proposing, at least for federal and public trust lands, a threshold of natural resources that would be left to future generations that would serve as a goal governing resource use decisions); William F. Pedersen, *Protecting the Environment—What Does that Mean?*, 27 LOY. L. REV. 969 (1994).

50. The recently drafted Sustainable Development Goals under review in the United Nations contain numerous specific goals and targets that address environmental and public health issues, and may provide useful input for this exercise. See *Sustainable Development Goals*, *supra* note 46.

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 541

B. Governance Methods, Roles, and Responsibilities

By comparison to the limited legal literature on setting environmental endpoints and performance measures, considerable work has been done and many ideas offered on how to improve the *process* of environmental decision-making. Stated as methods, many of these proposals envision a system of governance offering the following capabilities: 1) sufficient information is assembled and vetted to support sound decision-making;⁵¹ 2) effective communication methods are adopted and tailored to public as well as professional and governmental audiences;⁵² 3) environmental decisions are made with broad and meaningful public participation at the earliest stages of governance, especially when setting endpoints and goals;⁵³ 4) decisions are based on sustainability principles, including assessment of intergenerational impacts and systems thinking, in fashioning solutions.⁵⁴

Ideally, these capabilities will foster achieving environmental outcomes using the optimum mix of private and public incentives, market mechanisms, and traditional regulation to drive efficiency and innovation. Many good ideas for improvements in decision-making are already on the table. The challenge is to choose the highest-priority reform proposals and work together to come up with better plans to put more of them into effect.

Extensive legal and policy work has also addressed issues such as the division of responsibility between federal and state government,⁵⁵ the strengths and capabilities of local governments

51. For a useful summary of how developing and communicating environmental science needs to increase understanding of interdependent and complex economic, social, and natural resource systems, see Joseph Fiksel et al., *EPA at 40: Bringing Environmental Protection Into the 21st Century*, 43 ENVIRON. SCI. & TECH. 8716 (2009).

52. See, e.g., DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 22, 203-04 (1999).

53. David L. Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 426 (2010).

54. See, e.g., JOHN C. DERNBACH ET AL., ENVTL. LAW INST., ACTING AS IF TOMORROW MATTERS: ACCELERATING THE TRANSITION TO SUSTAINABILITY (2012).

55. See, e.g., SCHOENBROD ET AL., *supra* note 8, at 6 (advocating realignment of authority between federal and state government); Robert L. Glicksman,

to play a larger role in environmental management,⁵⁶ the growth of the reach and effectiveness of “private governance,” and the role of the individual.⁵⁷ There have been major developments in corporate strategy to improve company performance in operations and product development as well as improved supply chain performance.⁵⁸

The term “private governance” also encompasses programs initiated by nongovernmental organizations in cooperation with businesses, such as product certification standards to inform selection of suppliers and to guide consumer selection of products.⁵⁹ It may be difficult to assess the impacts of this diverse mix of private-sector actors on the achievement of environmental endpoints and goals, and the accountability and durability of private-sector programs may be less secure. However, there is no doubt that the role of private governance in environmental management is growing and has the potential to make a substantial contribution to environmental progress.

A larger contribution from individuals to more sustainable economies and communities through consumption and lifestyle choices is another source of energy, innovation, and potential progress in achieving environmental goals.⁶⁰ To date, most environmental laws have focused on regulating industrial

Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations, 40 ENVTL. L. 1159, 1175 (2010).

56. Professor John R. Nolon has authored a series of articles on how local governments can play important roles in energy conservation mitigation of climate change and advancement of sustainable development. *See, e.g.*, John R. Nolon, *Land Use for Energy Conservation: A Local Strategy for Climate Change Mitigation*, 27 J. LAND USE & ENVTL. L. 295, 296 (2012); John R. Nolon, *The Land Use Stabilization Wedge Strategy: Shifting Ground to Mitigate Climate Change*, 34 WM. & MARY ENVTL. & POL'Y REV. 1 (2009).

57. STEERING COMM. OF THE STATE-OF-KNOWLEDGE ASSESSMENT OF STANDARDS AND CERTIFICATION, RESOLVE, INC., TOWARD SUSTAINABILITY: THE ROLES AND LIMITATIONS OF CERTIFICATION (2012), *available at* <http://www.resolve.org/site-assessment/files/2012/06/Report-Only.pdf>, *archived at* <http://perma.cc/7U26-5XJ2>.

58. For an excellent compilation of articles on corporate environmental management, see HARV. BUS. REV., GREENING YOUR BUSINESS PROFITABLY (2011).

59. *See generally* STEERING COMM., *supra* note 57.

60. *See, e.g.*, JASON J. CZARNEZKI, EVERYDAY ENVIRONMENTALISM: LAW, NATURE, & INDIVIDUAL BEHAVIOR (2011); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 133 (2013).

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 543

processes or products, with some limited attempts to influence consumer behavior through labeling and ranking.⁶¹ As many students noted, the intersection of individual responsibility and moral/ethical approaches to environmental protection merits further thought and research.

Crafting the environmental vision, endpoints, goals, and governance roles outlined above is not a task for a single report. We envision a series of dialogues over the coming years among diverse stakeholders focused on identifying these metrics and formulating ways to communicate these metrics that have broad popular appeal across political perspectives, socio-economic background, and geographic region.

IV. CONCLUSIONS

Most U.S. environmental laws have not been significantly revised for decades. As we have seen, this situation has continued in large part because of increasing polarization of opinion on the role and value of federal law and regulation, a division of opinion that seems more extreme in Congress than in the general public. At the same time, the public has largely disengaged on environmental issues and no longer demands environmental change or reform.

Those who believe that U.S. law has had a positive effect on the environment and the community fear that reopening those laws would weaken that foundation. Those who do support the framework but see the need for change disagree on whether to start over in some areas with a “clean slate” or to focus on dysfunctional areas and gaps or “white spaces” to make the existing system more efficient. Despite these differing perspectives on the possibilities for reform, there are many good ideas in the legal literature, and a good deal of consensus, on how to make incremental improvements in the process or content of environmental law and to enhance clarity or improve efficiency. Changes in the statutes require, however, a Congress ready and willing to address them.

Based upon the research reflected in this article, we believe a new, concerted, and continued effort is needed to build twenty-

61. Vandenbergh, *supra* note 60, at 148.

first century environmental law and policy. To do so, environmental professionals should lead in reengaging the American public in understanding pressing environmental problems, from climate change to water supply stress to species extinctions, in a manner that makes the issues real and immediate to them. We think that working to revive an understanding of environmental ethics and to define a set of clear and compelling goals for environmental law and policy could provide a platform for tracking and communicating with the public about progress on an ongoing basis. The process cannot end with a single report.

In addition, our work confirms that innovation in environmental law and management is happening and will continue to happen broadly in business, civil society, and in government in many areas of the country. The continued absence of twenty-first century energy policy and environmental policy initiatives from Congress does not mean no progress can be made, even on the overarching issue of climate change. We also know that innovation in environmental law and policy has tended to come in short, narrow waves.⁶² Our responsibility as environmental professionals is to produce the good ideas that can be advanced when the time is ripe. As the Chicago economist Milton Friedman wisely observed many years ago:

There is enormous inertia—a tyranny of the status quo—in private and especially governmental arrangements. Only a crisis—actual or perceived—produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around. That, I believe, is our basic function: to develop alternatives to the existing policies, to keep them alive and available until the politically impossible becomes politically inevitable.⁶³

62. David Rejeski, *Any Big Ideas Left?* 28 ENVTL. F. 36, 37-38 (2011), available at http://www.wilsoncenter.org/sites/default/files/AnyBigIdeasLeft-Rejeski_0.pdf, archived at <http://perma.cc/L4W9-DYQE>.

63. MILTON FRIEDMAN, CAPITALISM AND FREEDOM xiii-xiv (1962).

2015] *ENDING THE TYRANNY OF THE STATUS QUO* 545

APPENDIX: List of principal reports, articles and studies reviewed by ELI (34)

Academic (16)

- 1997 – *Thinking Ecologically* (Chertow & Esty, Yale)
- 1999 – *Eco-pragmatism: Making Sensible Environmental Decisions in an Uncertain World* (Farber, Berkeley)
- 2004 – *The Making of Environmental Law* (Lazarus, Harvard)
- 2006 – *The New Environmental Regulation* (Fiorino, MIT Press)
- 2007 – *CPR for the Environment* (Flournoy, Center for Progressive Reform)
- 2009 – *Agenda for a Sustainable America* (Dernbach)
- 2009 – *Breaking the Logjam* (Schoenbrod, Stewart, Wyman, NYU)
- 2010 – *The Future of Environmental Protection* (Flournoy et al., CPR)
- 2010 – *Beyond Environmental Law: Policy Proposals for a Better Environmental Future* (Flournoy, Driesen, et. al)
- 2010 – *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (Kysar, Yale)
- 2012 – *Acting As If Tomorrow Matters* (Dernbach)
- 2013 – *Shifting Paradigms Transform Environmental and Land Use Law: The Emergence of the Law of Sustainable Development* (Nolon, Pace)
- 2013 – *Private Environmental Governance* (Vandenberg)
- 2013 – *Conservative Principles for Environmental Reform* (Adler, Case Western Reserve)
- 2014 – *Reimagining Environmental Law for the 21st Century* (Gaines, Aarhus)
- 2014 – *Old Statutes, New Problems* (Freeman and Spence, Harvard and U. of Texas)

Commission (10)

- 1988 – Project 88 (Wirth, Heinz, Stavins)
- 1990 – Project 88 Round II (Wirth, Heinz, Stavins)
- 1995 – *Reinventing Environmental Regulation* (Clinton, Gore)
- 1995 – *Setting Priorities, Getting Results* (Howes, NAPA, 1st of 3)

546 *PACE ENVIRONMENTAL LAW REVIEW* [Vol. 32]

- 1996 – *Sustainable America: A New Consensus* (PCSD)
1997 – *Resolving the Paradox of Environmental Protection*
(Howes, NAPA, 2nd of 3)
1998 – *Enterprise for the Environment* (Ruckelshaus, Hausker)
1999 – *Towards a Sustainable America* (PCSD)
2000 – *Environment.gov* (Howes, NAPA, 3rd of 3)
2007 – *Taking Environmental Protection to the Next Level*
(Howes, NAPA)

NGO/Think Tank (8)

- 1985 – *An Environmental Agenda for the Future* (environmental
NGO leaders)
1996 – *The Alternative Path* (Aspen Institute)
1998 – *Pollution Control in the United States: Evaluating the
System* (Davies/Mazurek, Resources for the Future or RFF)
1998 – *The Next Industrial Revolution* (McDonough and
Braungart)
2001 – *Long-Term Goals for Governments* (Rejeski & Wobig,
Wilson Center)
2001 – *Our Future, Our Environment* (Rejeski & Clancy, RAND)
2010 – *Toward a New National Energy Policy: Assessing the
Options* (RFF)
2001 – *Vision 2050* (World Business Council for Sustainable
Development)
2012 – *Rethinking Environmental Federalism in a Warming
World* (RFF)